PATIENCE ZARANYIKA
versus
SIMPLICIUS JULIUS CHIHAMBAKWE N.O
and
KABELO TRUST
(Represented by its Trustees for the time being)
and
MAUD ZARANYIKA
and
HARREN HARRISON ZARANYIKA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 17 October 2024 & 27 March 2025

Opposed Application

F Mahere, for the applicant
S Hoko, for the first respondent
T Mpofu, for the second respondent

TSANGA J:

The backdrop to this matter is a Will which was executed by the late Abraham Zaranyika who passed away in 2001. Mr Simplicious Chihambakwe, the first respondent herein, was appointed in the Will as the executor. In that Will, the deceased bequeathed among other assets, No 21 Van Praagh Avenue, Milton Park, in Harare to his wife Maud Zaranyika. She is the third respondent herein. The bequest was upon the condition that on her death or remarriage, the property would be held in a Trust called ***Abraham Zaranyika Trust*** for the benefit of stated beneficiaries. His desire did not materialise. The property was instead sold to Kabelo Trust in 2012, the second respondent herein, as represented by its Trustees.

It is common cause that gravely dissatisfied by this turn of events, Patience Zaranyika, the applicant who is one of the children of the late Abraham Zaranyika, brought an application for review of the administration of her father's estate in 2018. This was under case no 3577/18. In that application it is further common cause that she also sought the setting aside of the

agreement of sale of No. 21 Van Praagh Ave, Milton Park, Harare to Kabelo Trust. This was on the basis that the sale of the property was contrary to her father's wishes as per his Will.

It is not in dispute that whilst Justice Chirawu-Mugomba who heard that matter indeed found that there were administrative flaws in the manner the estate had been wound up, the applicant, however, did not succeed in obtaining the coveted order to set aside the sale of that property. Justice Chirawu- Mugomba stated that the applicant could not seek the setting aside of the agreement of sale through a court order application for a review. Her judgment in the matter is under HH 526/19 and was passed on the 31st of July 2019.

It is also not in dispute that when Justice Chirawu-Mugomba gave her judgment to that effect on the 31st of July 2019, the applicant was fully aware then from its content that she specifically needed to seek the setting aside of the agreement of sale as a separate matter. As she herself avers "that is the purpose of this application". It is an application for a declaratur to the effect that the first respondent (Mr Chihambakwe) acted wrongfully, unlawfully and unethically when he disposed of the property to Kabelo Trust contrary to the provisions of the deceased's Will. Consequential relief is thus sought to set aside the agreement of sale concluded with Kabelo Trust on the 4th of September 2012.

First and Second Respondents' Preliminary Points

The application is resisted with several preliminary points said to go to the root of the matter. Mr Hoko, appearing for Mr Chihambakwe, argued that this is a text book case of a matter that has prescribed. This is given that the sale took place in 2012 and this application was only lodged in February 2023 some eleven years after the fact. He also pointed out that Patience, the applicant, had approached the court in 2018 seeking to have the agreement cancelled and obtained a judgment in 2019. By filing her application in 2023, her claim was said to have prescribed after three years even using these later dates. There was also no interruption of prescription. The fact that things were not done procedurally in administering the estate was said not be the point since prescription does not say irregularities affect prescription.

Mr Mpofu, appearing on behalf of Kabelo Trust, equally emphasised this point on prescription, highlighting that its role is to discourage litigants from sitting on a cause of action. It gives finality to cases. He stressed that prescription is further, a matter of substantive as opposed to procedural law. In this instance, the right to seek a remedy was said to have been extinguished after three years since as of 2018 given that when she approached the court she had a full cause of action and the facts needed to pursue her case.

He added other points *in limine* deemed dispositive of the matter, submitting that a *fidei commissum* can sell property and as such the applicant had no cause of action. (This is where a person is bequeathed property as a fiduciary with the expectation that on the occurrence of a specified event, the inheritance will pass to another). He iterated that in order to attack such a sale, it would have to be shown that the property was sold by the fiduciary with no necessity to sell and also that the action in selling the property was in bad faith. None of these situations was said to apply in this case as the property had been sold out of financial necessity.

The third point he raised was that the applicant does not have rights because the party with legal interest to property owned or that must be owned by the envisaged Trust ought to be a Trustee. Applicant is not a Trustee. His fourth preliminary point was that the doctrine of peremption disentitles a party from challenging a judgment she has already agreed with.

Mr Mpofu also pointed to pending proceedings in a matter where the Kabelo Trust has brought proceedings to obtain title and in the alternative damages, following the judgment by Justice Chirawu- Mugomba. Applicant is a party to those proceedings. He submitted that it is in those proceedings that she should argue the issue of title. He highlighted that this argument on pending proceedings is in the alternative in the event that the court does not find favour in the four preliminary points he raised. On costs, he put forward that the applicant has unnecessarily put his client to costs, justifying costs on a higher scale.

The Applicant's Response to the Preliminary Points

Ms Mahere, for the applicant, agreed from the onset in framing the issue that the case is founded on the judgment of Justice Chirawu-Mugomba where the court was approached in 2018, the matter heard in 2019 with the judgment also being handed down in 2019. She submitted that at the time that the agreement was entered into in 2012, the applicant did not have enough information. She agreed that when the applicant obtained the judgment by Justice Chirawu-Mugomba on the 31st of July 2019, she now had her full set of facts for her cause of action. She submitted that the cause of action arose in July 2019 and that these proceedings were instituted in February 2023. Nonetheless, despite these points of consensus, her calculation of the three year period was off the mark in that she erroneously believed the three year period had not yet expired.

She went on to submit being that as it may, in any event a declaratur is not subject to prescription. She cited the case of *Ndlovu v Ndlovu* 2013 (1) ZLR 110 as an authority where NDOU J as he then was, relying on the South African authority of *Oertel & Ors* v *Director of Local Government* 1981 (2) SA 477 (T) remarked that not every debt is subject to prescription.

She also relied on the remarks by Chikowero J in *NSSA v City of Harare* HH 385/18 to the effect that a declaratur does not prescribe.

She also argued that with the property ultimately devolving on a Trust as per the Will of the deceased, it should not have been sold. She further submitted that the import of the judgment by Justice CHIRAWU- Mugomba in 3577/18 being that there should be an inquiry into all transactions provided in the Will, this meant that the property effectively remains at large for persons to object to any conduct in dealing with that property by the executor. To the extent that the matter relating to the estate account remains a live issue, she argued that the claim cannot be said to have prescribed until there is compliance by the executor. Her submission in essence was that unless there is a close to the distribution account, no one can say proceedings are no longer alive.

As for the applicant's standing in bringing this case, Ms Mahere submitted that the test is whether or not a litigant has substantial interest in proceedings. In this instance, the proceedings were said to flow from a judgment where the applicant was *dominus.* As a beneficiary of the Will, she was also said to have direct and substantial interest as the parties to a Trust include the beneficiaries and not just the Trustees. The argument on peremption by complying with judgment was said to be meritless. As for the pending matter, her submission was that the cause of action is different and separate from the present claim. On costs she stated that the matter is not vexatious and therefore there was no justification for costs on a higher scale. She argued that the preliminary objections ought to be dismissed.

The essence, of Mr Hoko's reply to these submissions was that prescription was unaltered at law by the Justice CHIRAWU-MUGOMBA judgment. What is before the court is an agreement of sale and whether it has prescribed. The non-prescription of a declaratur in the case relied on from South Africa was said to relate to statutory obligations. The arguments relating to reopening of the account were also said to be between the executor and the applicant.

Mr Mpofu's key response was that the applicant had clearly miscalculated the running of three years given the acceptance that the 2019 judgment is germane to this present claim. In that regard the matter, he reiterated, has clearly prescribed. He emphasised that whether the date of full knowledge is taken to be 2012 when the agreement of sale was entered into or 2018 when she brought her application for review and setting aside the agreement or 2019 when the judgment in the review case was handed down, whichever date one takes, the matter has prescribed. He also submitted in response that the argument that a declaratur does not prescribe is a wrong position of the law if reliance is placed on the *Ortel* case. He highlighted that the

Ortel case excluded public rights on the basis of the wording of their Prescription Act whereas section 2 of our Prescription Act [Chapter 8:11] resolves this issue in its definition of a debt which include even those under statute. On applicant's standing he maintained that it is only a Trustee that can vindicate the property in a trust and to the extent that the applicant is not a Trustee she fails to establish her *locus standi*. As for peremption, he still highlighted that she had to take action within three years failing which she had effectively acquiesced with the judgment.

The law and legal analysis

Section 2 of the Prescription Act states that "debt", without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from **statute**, **contract**, **and delict or otherwise**. The applicant seeks to cancel an agreement of sale. In terms of s 15 (d) of the Prescription Act, the period of prescription applicable under a contract is three years. The applicant does not dispute that following the judgment of CHIRAWU MUGOMBA J on the 31s of July 2019 prescription began to run. She was fully aware of the identity of the debtor and of the facts from which her claim arose. This means that the claim for the reversal of the contract prescribed on the 1st of August 2022. It was evident from Ms Mahere's submissions that she had miscalculated the period whilst in no uncertain terms accepting the relevant period in question as to when prescription began to run. Prescription goes to the root of a claim and as such there is no need to go into the merits of the case save to say a few remarks on the preliminary point that a declaration is not affected by prescription.

In *Ndlovu* v *Ndlovu & Anor* cited earlier, NDOU J indeed stated that it is only a debt as defined in the Prescription Act which prescribes and that a declaratory order, being a remedy to secure the public interest of certainty or correct legal position was said not to prescribe. He placed reliance on the South African case of *Oertel & Ors* v *Director of Local Government* 1981 2 SA 477 T at 492 in which it was reasoned that:

> "Public rights are excluded from the operation of the Prescription Act…and "debt" in the Act must be necessarily restricted to such claims as have arisen in the field of private law. Whilst every debt encompasses an obligation not every obligation constitutes a debt for the purposes of the Prescription Act."

Mr Mpofu is absolutely correct that the remarks therein were specific to their Prescription Act. Our prescription Act in its definition of a debt includes those obligations arising from statute. This is unlike the South African Act which was the subject matter of discussion in the *Ortel* case.

In *Syfin Holdings Ltd* v *Pickering* 1982 (1) ZLR 10 (SC), a Supreme Court case, GEORGES JA in examining the definition of a debt in the Prescription Act, remarked that the definition was broad enough to include among others, claims **for declarations of rights in relation to any given set of circumstances.**" As highlighted in *Jasper Dhliwayo & Ors v Tinoziva Bere N.O & Ors* HH 164/24, a declaration of rights is subject to prescription when examined against the backdrop of a claim which is itself subject to prescribed time limits. As explained:

> "Put differently, the substance of the claim that gives rise to the quest for a declaratur is a necessary starting point in determining whether the quest for a declaratur has also prescribed. If upon examining the nature of the claim, it emerges from its holistic substance that it is one which ought to have been and could have been resolved through prescribed channels, then if the time limit for pursuing the matter through those channels has prescribed so would the quest for a declaratur. The quest for a declaratur cannot, simply put, be divorced from the causa as to do so would indeed create a situation where those who have done nothing about their claim resort to using the declaratur as a back door to seeking coercive relief which they could have sought within the prescribed time limits."

In essence therefore the fact that the applicant seeks a declaratur does not save the matter from prescription. Given the finality of prescription there is no need to delve into the issue of *locus standi* or peremption.

Costs have been sought on a higher scale on the part of Kabelo Trust. Whilst the Kabelo Trust in particular has indeed been put to expense in defending the matter, I am not convinced that the application falls into reckless category as envisaged in case law. For example, in *Zimbabwe Online Private limited v Telecontract* 2012 (1) ZLR 197(H) circumstances for the award of such costs were explained as follows:

> "Whilst the courts will not lightly concede to a prayer for an award of costs on a legal practitioner to client scale, such an award will be granted where the unsuccessful party's conduct has been completely unreasonable and reprehensible. Where a party's attitude has been that of a man who has deliberately and stubbornly refused to a dispassionate mind to bear on the dispute, which could have resolved quite amicably and in expensively if he had showed the slightest cooperation, it would in such circumstances be quite unfair for the successful part to be put out of pocket in the matter of costs. The unsuccessful party's conduct could rightly be described as vexatious or reckless or frivolous, any one of which could be a ground for the award of costs on a higher scale".

Even if the time period for prescription could easily have been calculated, there have indeed been those earlier conflicting decisions on whether a declaratur prescribes which may have given rise to false hope in the absence of knowledge of later cases or the legal foundations upon which Ndlovu case was not applicable.

In the final analysis, the matter having prescribed, the application is dismissed with costs.

H Chitapi & Associates, Applicants Legal Practitioners
Chihambakwe, Mutizwa & Partners, first Respondent's Legal Practitioners
Musunga & Associates, Respondent's Legal Practitioners